(1) Supreme Court, U.S.
FILED

NO. 00 208 AUG 7 - 2000

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CLAUDIA DEGENNARO,

Petitioner,

v.

ROBERT C. FURR, chapter 7 trustee,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Claudia DeGennaro, *Pro Se*
462 S.W. Molloy St.
Port St. Lucie, FL 34984
561/340-1960

36pp

QUESTIONS PRESENTED

Whether, a trustee in bankruptcy can evade the due process clause of the Fifth Amendment to the United States Constitution, by ignoring the Federal Rules of Civil Procedure 4(c)(2)(C)(i), 4(c)(2)(C)(ii), 4(d)(1) and ignoring state law regarding service of process, Florida Rules of Civil Procedure F.S. §48.031, and obtain a default judgment denying the debtor's discharge, through mailing a summons and complaint to a knowingly closed post office box, knowing that the debtor and her family were being evicted from their home, and knowing an address of the debtor that was more reasonably calculated to effect service.

Whether the court of appeals erred by failing to apply its own prior decision in Manufacturers Hanover Trust Company v. Ponsoldt, 51 F.3d 938 (11th Cir. 1995) to this instant case.

Whether the decisions below conflicts with and are inconsistent with the decisions of this Court, including as to the meaning and import of this Court's decisions in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and Robinson v. Hanrahan, 93 S.Ct. 30 (1972).

LIST OF PARTIES

Petitioner	**Counsel**
Claudia DeGennaro	Pro Se
Respondent	
Robert C. Furr	Furr & Cohen, P.A. 1499 W. Palmetto Park Rd. Suite 412 Boca Raton, FL 33486
Other Parties	
Janie Dean Chevrolet, Inc. Patricia Dean Estate of Roger Dean	Richard Goldstein, Esq. Goldstein & Tanen, P.A. Two South Biscayne Blvd. Suite 3250 Miami, FL 33131
United States Trustee	Solicitor General of the United States Department of Justice 950 Pennsylvania Ave., N.W. Room 5614 Washington, D.C. 20530-0001

TABLE OF CONTENTS

Page

Questions Presented ..... *i*

List of Parties ..... *ii*

Table of Contents ..... *iii*

Index to Appendix ..... *iv*

Table of Cited Authorities ..... *v*

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 5

Reasons for Granting the Writ 8

Conclusion 13

Appendix

Index to Appendix

Appendix A
USCA 11th Circuit Opinion
(December 2, 1999) ..... App 1

Appendix B
USCA 11th Circuit Judgment
(December 2, 1999) ..... App 3

Appendix C
USCA 11th Circuit Denial for Rehearing and Rehearing En Banc
(March 28, 2000) ..... App 5

Appendix D
USCA 11th Circuit Denial for Rehearing
(March 28, 2000) ..... App 7

Appendix E
US District Court Judgment
(October 27, 1998) ..... App 9

Appendix F
US Bankruptcy Court Order
(November 12, 1996) ..... App 15

TABLE OF CITED AUTHORITIES

Cases: ***Page***

Coggin v. Coggin (In re Coggin),
30 F.d 1443, 1450 n.8(11th Cir. 1994) 7,11

Hess v. Pawloski,
274 U.S. 352 (1927) 7,11

Manufacturers Hanover Trust Company v. Ponsoldt,
51 F.3d 938 (11th Cir. 1995) 12

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 7,10,11

Robinson v. Hanrahan,
93 S.Ct. 30 (1972) 10

Statutes, Rules and Regulations Cited:

United States Constitution, Fifth Amendment 2

1992 Fed.R.Civ.P. 4(c)(2)(C)(i) 3,11,12

1992 Fed.R.Civ.P. 4(c)(2)(C)(ii) 3,11,12

1992 Fed.R.Civ.P. 4(d)(1) 3,11,12

Fed.R.Civ.P. 60(b) 8

1992 Fed.R.Bankr.P.7001-7087 12

1992 Fed.R.Bankr.P.7004(a) 2, 11

1992 Fed.R.Bankr.P.7004(b)(1) 2

1992 Fed.R.Bankr.P. 7004(b)(9) 2,11,12

Fla.R.Civ.Proc.1.080(b) 4, 11,12

F.S. §48.031, Florida Statutes 4, 11,12

F.S. §48.161, Florida Statutes 4,11,12

OPINIONS BELOW

The written opinion of the United States Court of Appeals for the Eleventh Circuit is included in the appendix. *In re Claudia DeGennaro*, No. 98-5882 (11th Cir. December 2, 1999). The written opinion of the United States District Court, Southern District of Florida, is also included in the appendix. *In re Claudia DeGennaro*, No. 97-8162-CIV-Hurley (U.S.DC, October 28, 1998. The order of the United States Bankruptcy Court, Southern District of Florida, also is included in the appendix. *In re Claudia DeGennaro*, No. 92-30351-BKC-RAM, Adversary No. 92-1181-BKC-RAM-A (Bkrtcy.S.D.Fla., November 12, 1996).

JURISDICTION

The date on which the United States Court of Appeals decided this case was December 2, 1999. A petition for rehearing and a petition for rehearing en banc were timely filed. A timely petition for rehearing and a petition for rehearing en banc were both denied by the United States Court of Appeals on March 28, 2000.

An extension of time to file the petition for a writ of certiorari was granted to and including August 7, 2000 on June 22, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

1. U.S. Constitution, Fifth Amendment

- *1992* Fed.R.Bankr.P.7004(a) provides:

(a) Summons; Service; Proof of Service. Rule 4(a), (b0, (c)(2)(C)(i), (d), (e) and (g)-(j) F.R.Civ.P. applies in adversary proceedings. Personal service pursuant to Rule 4(d) F.R.Civ.P. may be made by any person not less than 18 years of age who is not a party and the summons may be delivered by the clerk to any such person.

- *1992* Fed.R.Bankr.P.7004(b)(1) and (9) provides:

(b) Service by First Class Mail. In addition to the methods of service authorized by Rule 4(c)(2)(C)(i) and (d) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing copies of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in writing filed with the court and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

- *1992* Fed.R.Civ.P. Rule 4(c)(2)(C)(i) and (d) provides:

(c)(2)(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule-

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

- *1992* Fed.R.Civ.P. Rule 4(d)(1) provides:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

- Fla.R.Civ.Proc.1.080(b) provides:

Service; How Made. When service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court. Service on the attorney or party shall be made by delivering a copy or mailing it to the attorney or the party at the last known address or, if no address is known, by leaving it with the clerk of the court. (In pertinent part)

- F.S. §48.031, Florida Statutes provides:

Service of process generally; service of witness subpoenas

(1)(a) Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents. Minors who are or have been married shall be served as provided in this section.

- F.S. §48.161, Florida Statutes provides:

Method of substituted service on nonresident

(1) When authorized by law, substituted service of process on a nonresident or a person who conceals his or her whereabouts by serving a public officer designated by law shall be made by leaving a copy of the process with a fee of $8.75 with the public officer or in his or her office or by mailing the copies by certified mail to the public officer with the fee. The service is sufficient service on a defendant who has appointed a

public officer as his or her agent for the service of process. Notice of service and a copy of the process shall be sent forthwith by registered or certified mail by the plaintiff or his or her attorney to the defendant, and the defendant's return receipt and the affidavit of the plaintiff or his or her attorney of compliance shall be filed on or before the return day of the process or within such time as the court allows, or the notice and copy shall be served on the defendant, if found within the state, by an officer authorized to serve legal process, or if found without the state, by a sheriff or a deputy sheriff of any county of this state or any duly constituted public officer qualified to serve like process in the state or jurisdiction where the defendant is found. The officer's return showing service shall be filed on or before the return day of the process or within such time as the court allows. The fee paid by the plaintiff to the public officer shall be taxed as cost if he or she prevails in the action. The public officer shall keep a record of all process served on him or her showing the day and hour of service.

STATEMENT OF THE CASE

During the spring of 1992, a trustee, Robert C. Furr was appointed to Claudia DeGennaro's bankruptcy case in the Southern District of Florida. The trustee had requested the turnover of certain documents that related to the bankruptcy and the debtor, Claudia DeGennaro complied in part. Nonetheless, the trustee stated that he had not received the documents. The debtor to avoid a problem, requested the trustee to, in the future, personally sign for all documents that the debtor would turnover. The trustee refused to sign for the documents personally.

Subsequently, on October 22, 1992, the debtor's

landlord noticed the trustee in a Motion for Relieve from the Automatic Stay in the bankruptcy court, so as to obtain permission to evict the debtor and her family from their home.

On November 12, 1992, the trustee filed an Adversary Proceeding, a complaint against the debtor to deny her discharge in the bankruptcy proceedings. He had directed that the summons and complaint be served on the debtor by mailing the documents by first-class mail to the debtor's closed post office box. This was the only method of service used by the trustee. The complaint alleged, among other things, that the debtor "changed residences and refused to disclose the new residence to the trustee".

The trustee continued to be in contact with the debtor's landlord's attorney during this time. On December 2, 1992, the bankruptcy court entered an "Amended Order" granting the debtor's landlord's Motion for Relief in the Automatic Stay, which such order gave the home address of the debtor and the trustee was supplied with a copy of the order.

On January 5, 1993 a Pretrial Conference on the trustee's Adversary Proceeding to deny the debtor's discharge, the trustee attended and the debtor did not because she had not received the summons and complaint. On January 19, 1993, the bankruptcy court entered a Final Judgment Denying Discharge of the debtor.

Then, in late 1995-1996, the debtor received some documents from the trustee (at the debtor's home address that the trustee obtained from researching the debtor's divorce proceedings[1]) pertaining to the bankruptcy proceedings. It was

---

[1]The initial divorce proceedings were started and ongoing from approximately September 1992 through January 1993.

then at a subsequent hearing that the debtor learned the trustee had obtained a default judgment against her, denying her discharge.

On June 4, 1996, the debtor filed a Motion to Vacate and Reverse the Final Default Judgment Denying her Discharge. On November 12, 1996, the bankruptcy court entered an order denying the debtor's Motion to Vacate the Final Default Judgment denying the debtor's discharge. Judge Robert Mark held that (i) "the trustee was not obligated to diligently look through everything that was filed or to take note of everything that was filed in order to determine a home address" and (ii) that even if the trustee had actual knowledge of a new address sufficient to require service at some other address, "the trustee was under no obligation to utilize another address in attempting service."

Federal District Court Proceedings

The debtor appealed the bankruptcy court's findings to the United States District Court, Southern District of Florida. The district court held that Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) did not apply to the debtor's case, but rather applied Coggin v. Coggin (In re Coggin), 30 F.d 1443, 1450 n.8(11th Cir. 1994) and Hess v. Pawloski, 274 U.S. 352 (1927). The district court held that the trustee's mailing a summons and complaint to deny the debtor's discharge to a knowingly closed post office box was sufficient due process, because the debtor had not filed a change of address form.

Eleventh Circuit Decision on Appeal

The Eleventh Circuit, in a decision dated December 2, 1999, affirmed the district court's determination that "relief under Fed.R.Civ.P. 60(b) from the final judgment dismissing her

bankruptcy case: the question raises a service of process question."

The Eleventh Circuit held that the matter was based on a "final judgment *dismissing* her bankruptcy case" as opposed to the issue of denial of a Motion to Vacate a Default Judgment Denying the debtor's discharge. It is important to note that the bankruptcy court has not dismissed the bankruptcy case. The court acknowledged only one aspect of the debtor's request for relief - Fed.R.Civ.P. 60(b). The court did not specifically address the issue of whether a judgment is void under these present circumstances, but rather affirmed "for reasons stated by the district court".

REASONS FOR GRANTING THE WRIT

Summary of Argument

Under the established Federal Rules of Civil Procedure and Federal Bankruptcy Rules, a party desiring to make service of a proceeding on an individual to deny discharge, is not only required to follow the federal rules, but is required to follow the respective state's rules. The Federal Rules, the Bankruptcy Rules and the State of Florida Rules do not specifically allow service to a closed post office box. These rules pertaining to service make reference to "individual's dwelling house or usual place of abode". Actual notice of the proceedings in an *in personam* proceeding, such as a denial of discharge, is important to be accomplished in order to protect the individual's constitutional rights.

Here the bankruptcy trustee knew, at the time of his filing a summons and complaint against the debtor to deny her

discharge in November 1992, that the debtor was in the process of being evicted from her home, knew the debtor was in the process of a divorce and further knew that the debtor's post office box was closed that the debtor had used only through July 1992. The debtor did not have legal counsel and knew nothing of a very technical and little known requirement in the bankruptcy proceedings that a Notice of Change of Address had to be filed with the court. Nonetheless the trustee decided to use only one method of service of process, mail by first-class to the closed post office box, so that he could evade actual service on the debtor, evade due process, and obtain a default judgment against the debtor. The facts here might be unusual, but the principal is not: fairness in due process and method of service of process must be reasonably calculated to provide actual notice.

Argument

A. A bankruptcy trustee, a person that unreservedly controls the case of the debtor, is responsible to review all documents that come into the case, and as such was noticed that the debtor was being evicted from her home. During the same time frame of the eviction, trustee chose to use a closed post office box, as opposed to the debtor's home address, as a place to mail his summons and complaint to deny the debtor's discharge, to evade actual notice and due process requirements.

The courts in this case decided that a trustee is too busy to, and is not obligated to "look through everything that was filed or to take note of everything in order to determine a home address" and that the debtor was required to file a change of address. Oddly though, in careful thought, if the trustee was too busy or not obligated to look through everything, then how would he know if in fact the debtor had filed a change of address. Furthermore, the trustee in this case was in constant

home address and that she was being evicted from the home by not only conversations with the landlord's counsel, but by notices and important motions to lift the automatic stay which had the debtor's home address on the notices. The trustee was indeed obligated to review all these documents, as that is his job.

In review of the service of process it is important to consider the construction of the phrases "usual place of abode" and "individual's dwelling house". The terms that apply to this instant case and service of process include actual residence, the effect of divorce, last and usual place of abode, and the effect of persons being in process of moving . The courts in this case did not consider these issues or consider the fact that the debtor was in transition and was losing her home.

B. The Eleventh Circuit Court has interpreted the term "reasonably calculated to provide actual notice" in a way that is inconsistent with the meaning and import of this Court's decisions in Mullane v. Central Hanover Bank & Trust Co. and Robinson v. Hanrahan.

The Eleventh Circuit made a somewhat contradictory ruling by stating "for reasons stated by the district court, we affirm." In so holding, the Eleventh Circuit's adoption of the district court's decision overrode this court's law and intent in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and in Robinson v. Hanrahan, 93 S.Ct. 30 (1972).

In Robinson v. Hanrahan as in this instant case, the underlying point is that even if a party followed a prescribed method of service and that party knew that the other party could not receive the intended mailed service, this manner of service was not reasonably calculated to apprise the party of the pendency of the proceedings and as such deprived the party of due process of law.

This Court found that in Mullane v. Central Hanover Bank & Trust Co. that "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The trustee here knew the debtor's home address, knew the debtor was being evicted and knew the debtor's post office box had been closed. In the courts in this instant case did not consider all the circumstances, but rather only clung to a little known, technical, and narrow bankruptcy rule that a debtor must file a Notice of Change of Address. Therefore, as to the question of whether the judgment was void in this instant case, the district court based its holding to deny vacating the default judgment on Coggin v. Coggin (In re Coggin), 30 F.3d 1443, 1450n.8(11th Cir. 1994) and Hess v. Pawloski, 274 U.S. 352 (1927) and Federal Rule of Bankruptcy Procedure 7004(b)(9) and did not apply the meaning or intent of Mullane v. Central Hanover Bank & Trust Co.

C. The bankruptcy court, the district court and the court of appeals would not address the debtor's issues as to whether other rules of service of process applied to this instant case and the courts only applied Federal Rule of Bankruptcy Procedure 7004(b)(9).

The debtor specifically requested the courts to decide whether other rules applied to the service of process, other than just Fed.R.Bankr.P.7004(b)(9). None of the courts replied to the request. The debtor sought a decision from the courts if the service of process of a summons and complaint on a debtor in 1992 to deny discharge was also subject to Fed.R.Civ.P. 4(c)(2)(C)and4(d)(1);Fed.R.Bankr.P.7004(a);and Fla.R.Civ.Proc.1.080(b), F.S. §48.031 and F.S. §48.161 Florida Statutes.

Specifically, an adversary proceeding, such as a proceeding to object to or revoke a discharge in the bankruptcy court is governed by Fed.R.Bankr.P.7001 and 7002. Both of these rules specify that the Federal Rules of Civil Procedure must be consulted and are applicable and incorporated in Fed.R.Bankr.P. 7001-7087.

The import of this is that the trustee only followed Fed.R.Bankr.P.7004(b)(9) and not Fed.R.Bankr.P.7004(b)(1), Fed.R.Civ.P. 4(c)(2)(C)and4(d)(1), Fla.R.Civ.Proc.1.080(b), and F.S. §48.031 and F.S. §48.161 Florida Statutes. Based on the rules of procedure in effect in 1992, the trustee was required to follow these other requirements to effect service on the debtor. These other requirements specifically required the trustee to serve the debtor either personally or if by mail, and no acknowledgment of service was received, to also serve personally.

D. The Eleventh Circuit Court in the case at bar has failed to apply its own prior decision in Manufacturers Hanover Trust Company v. Ponsoldt.

The district court would not address the debtor's cited case Manufacturers Hanover Trust Company v. Ponsoldt. to the instant, and because the Eleventh Circuit simply affirmed the district court's holding and did not comment on the law as applied to this case, the court of appeals erred by failing to apply its own law.

E. The trustee's failure to give actual notice to the debtor of the impending proceedings to deny the debtor's discharge and the debtor not receiving a notice, and the subsequent default judgment entered against the debtor is a denial of the debtor's constitutional rights under the Fifth Amendment of the United States Constitution.

subsequent default judgment entered against the debtor is a denial of the debtor's constitutional rights under the Fifth Amendment of the United States Constitution.

CONCLUSION

For the aforementioned reasons, Petitioner, Claudia DeGennaro, respectfully requests this Court to grant certiorari and find that: (1) there is no due process when a party has knowledge of a more reasonable address (home address) and chooses to use closed post office box in attempt to obtain jurisdiction in an in personam proceeding, and (2) a default judgment obtained by such manner is void.

Respectfully submitted,

Claudia DeGennaro

Claudia DeGennaro, Pro Se
462 S.W. Molloy Street
Port St. Lucie, Florida 34948

Date: August 7th, 2000

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-5882
Non-Argument Calendar

D.C. Docket No. 97-08162-CV-DTKH

IN RE: CLAUDIA DEGENNARO,

Debtor.

CLAUDIA DEGENNARO,

Plaintiff-Appellant,

versus

ROBERT C. FURR, Trustee,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(December 2, 1999)

Before EDMONDSON, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

Claudia Degennaro appeals the district court's denial of her motion for relief under Fed.R.Civ.P. 60(b) from the final judgment dismissing her bankruptcy case: the case raises a service of process question. For the reasons stated by the district court, we affirm.

AFFIRMED.

United States Court of Appeals
For the Eleventh Circuit

No. 98-5882
Non-Argument Calendar

District Court Docket No. 97-08162-CV

IN RE: CLAUDIA DEGENNARO,

Debtor.

CLAUDIA DEGENNARO,

Plaintiff-Appellant.

versus

ROBERT C. FURR, Trustee,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before EDMONDSON, BLACK and MARCUS, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT the plaintiff-appellant pay to the defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 2, 1999
For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: APR 06, 2000

App. 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-5882-CC

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
MAR 28, 2000
THOMAS K. KAHN

IN RE: CLAUDIA DEGENNARO,

Debtor,

CLAUDIA DEGENNARO,

Plaintiff-Appellant,

versus

ROBERT C. FURR, Trustee,

Defendant-Appellee.

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19____, _____ _F.2d_____).

Before: EDMONDSON, BLACK, and MARCUS

PER CURIAM:

The Petition (s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ G.L. Edmondson
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-5882-CC

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
MAR 28, 2000
THOMAS K. KAHN

IN RE: CLAUDIA DEGENNARO,

Debtor.

CLAUDIA DEGENNARO,

Plaintiff-Appellant,

versus

ROBERT C. FURR, Trustee,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

---

BEFORE: EDMONDSON, BLACK, and MARCUS, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the Appellant, Claudia DeGennaro, is DENIED.

ENTERED FOR THE COURT:

/s/ G.L. Edmondson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

In re:
CLAUDIA DEGENNARO and
ANTHONY DEGENNARO,

Debtors.
_____/

CLAUDIA DEGENNARO,

Appellant,

CASE NO. 97-8162-CIV-HURLEY

v.

ROBERT C. FURR,

Appellee.
_____/

JUDGEMENT

I. BACKGROUND

THIS MATTER comes before the Court on appeal from a final order of the United States Bankruptcy Court for the Southern District of Florida, Robert Mark, Judge. The bankruptcy petition was originally filed under Chapter 11 in the Eastern District of New York but was subsequently converted to a Chapter 7 bankruptcy and transferred to the Southern District of Florida, where Robert C. Furr was appointed the Chapter 7 Trustee in Bankruptcy.[1] The Trustee moved to consolidate the petitions of the appellant-debtor, Claudia DeGennaro, (hereinafter "Appellant") and her former spouse, Anthony DeGennaro, and the Bankruptcy Court consolidated

the petitions.

The debtors did not attend the first §341 meeting scheduled, and although in attendance at the second meeting, they refused to respond to the questions posed. On November 12, 1992, the Trustee filed an adversary complaint objecting to the debtors' discharge on numerous grounds. The complaint, summons and order setting filing and disclosure requirements were served by first class mail on the address contained in the debtors' schedules and pleadings.[2] At a pretrial conference held on January 5, 1993, before Bankruptcy Judge Mark, the debtors failed to appear, and the Trustee moved for entry of default judgment in his favor. On January 19, 1993, the Bankruptcy Court entered a Final Judgment Denying Discharge of Debtors (hereinafter the "judgment") for failure to file any responsive pleading and failure to attend the ordered pretrial conference. Three and one- half years later (June 5, 1996), Appellant filed her Motion to Vacate and Reverse the Final Judgment Denying Discharge of Debtor. After hearing evidence on why the Judgment should be set aside, the Bankruptcy Court denied Appellant's motion to vacate. That order denying Appellant relief is the years later (June 5, 1996), Appellant filed her Motion to Vacate and Reverse the Final Judgment Denying Discharge of Debtor. After hearing evidence on why the Judgment should be set aside, the subject of this appeal.

II. DISCUSSION

The Bankruptcy Court's findings of fact will not be set

---

[1] Hereinafter, the Court will refer to appellee Robert Furr as the "Trustee."

[2] The address to which the Trustee mailed service was: 4300 U.S. Highway 1, Suite 203-329 Jupiter, FL 33477. It was a private post office box located at a Mailboxes, Etc. store.

aside unless clearly erroneous. Fed.R.Bank.P.8013; Green Tree Acceptance, Inc. v. Calvert (In re Calvert), 907 F.2d 1069, 1071 (11th Cir. 1990). This Court reviews de novo the Bankruptcy Court's conclusions of law. Calvert, 907 F.2d at 1071. Appellant contends that the Bankruptcy Court erred in denying her motion to vacate on numerous grounds. The Court has distilled Appellant's claims of error into the following two issues:

1. Whether the Judgment was void due to the Trustee's alleged failure to serve the complaint upon Appellant by a means reasonably calculated to provide actual notice?

2. Whether Appellant sought to set aside the Judgment within a reasonable time?

The Court answers both questions in the negative.

A. Whether the Judgment was Void

Appellant argues the Judgment was void because she was not properly served, i.e., she did not receive actual notice of the complaint and the mailing of the complaint was not likely to provide her with actual notice. Federal Rule of Civil Procedure 60(b)(4) allows a party to set aside a final judgment that is void. There is no time limit in which a party must bring a Rule 60(b)(4) motion to set aside a void judgment. See Hertz Corp. v. Alamo Rent-A-Car, Inc., 16 F.3d 1126, 1130 (11th Cir. 1994)(citing 11 WRIGHT & MILLER, Federal Practice and Procedure §2862 at 200 (1973). Courts will find judgments to be void when service has not been properly effected. See Varnes v. Local 91, Glass Bottle Blowers Assoc. of United States and Canada, 674 F.2d 1365, 1368 (11th Cir. 1982).

The Bankruptcy Court made several findings of fact with regard to the service of process in this case. See Tr. 150-62.[3] First, the Appellant's address of record was the private post office box located at 4300 U.S. Highway 1, Suite 203-329 Jupiter, FL 33477. Second, Appellant filed no writing indicating a change of that address. Third, by her own choice, Appellant stopped retrieving mail from her post office box in June 1992, but she still used that address on subsequent pleadings filed with the court in July. Fourth, the Trustee's actions with regard to service conformed to the requirements of Federal Rule of Bankruptcy Procedure 7004(b)(9), i.e., service by first-class mail to the record address of the debtor. The record on appeal supports these findings; therefore, they are not clearly erroneous.

Based on these findings, the Bankruptcy Court concluded, as a matter of law, that the Trustee's mailing of the complaint to Appellant's record address constituted proper service, and the Judgment was not void. Relying on Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), Appellant argues the court erred in concluding service was proper because the mailing of service to her post office box was not a method reasonably calculated to provide her actual notice, as required by due process.[4] This argument fails. Because Federal Rule of Bankruptcy Procedure 7004(b)(9) explicitly provides for service by first-class mail at the debtor's record address, service conforming to that section

---

[3] "Tr." denotes the transcript from the Bankruptcy Court's October 30, 1996, hearing on Appellant's Motion to Vacate Final Judgment Denying Discharge of Debtor.

[4] It is unclear exactly when Appellant closed the post office and when Mail Boxes, Etc. stopped accepting mail for Appellant. These ambiguities, however, are irrelevant because it is undisputed that Appellant did not provide the court or the Trustee with a more current address.

is necessarily valid and cannot be the basis for voiding a final judgment. See Coggin v. Coggin (In re Coggin), 30 F.3d 1443, 1450 n.8 (11th Cir. 1994) (service pursuant to Bankr. Rule 7004(b)(9) is effective even if mailed to wrong address if that address was the last used by the debtor); see also Hess v. Pawlowski, 274 U.S. 352 (1927) (finding for the first time that service by mail does not violate due process). Appellant received all the process she was due under the Bankruptcy Code.

B. Whether Appellant Acted Within a Reasonable Time

Appellant's second claim is based on Federal Rule of Civil Procedure 60(b)(6), a catch-all provision providing for relief from a final judgment "for any other reason." A motion under Federal Rule of Civil Procedure 60(b)(6) must be made within a "reasonable" time. Whether a delay is reasonable is determined by evaluating all the circumstances. See Griffin v. Swim-Tech Corp., 722 F.2d 677, 680 (11th Cir. 1984). Appellant claims she acted within a reasonable time because she moved to vacate six months after learning of the Judgment on November 30, 1995.[5] The Bankruptcy Court concluded, as a matter of law, that Appellant did not act within a reasonable time. Tr. at 160.

Relief from a final judgment under Rule 60(b)(6) is an equitable remedy. See Griffin, 772 F.2d at 680. Appellant believes she is entitled to such equitable relief because she was dealing with difficult personal problems at the time the Judgment was entered and denial of discharge would be a great hardship. The Court accepts these premises as true. Nonetheless, the default and the extremely lengthy delay following it were

---

[5] Appellant's motion to vacate was filed on June 5, 1996.

substantially, if not entirely, caused by Appellant. She simply stopped participating in the bankruptcy proceeding. This is not the type of conduct that justifies the extraordinary relief available under Rule 60(b)(6). See id.

III. CONCLUSION

For the foregoing reasons, the Judgment of the Bankruptcy Court is hereby AFFIRMED.

The default judgment entered against Appellant will not be vacated.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 27th day of October, 1998.

/s/
Daniel T.K. Hurley
United States District Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:
CLAUDIA DEGENNARO and
ANTHONY DEGENNARO,

Debtors.
_____/

CASE NO. 92-30351-BKC-RAM
Chapter 7
Substantively Consolidated

ROBERT C. FURR, TRUSTEE IN BANKRUPTCY,

Plaintiff,

vs.

CLAUDIA DEGENNARO and
ANTHONY DEGENNARO,

Defendants.
_____/

ADV. NO. 92-1181-BKC-RAM-A

ORDER DENYING DEBTOR, CLAUDIA DEGENNARO'S MOTION TO VACATE FINAL DEFAULT JUDGMENT

THIS CAUSE came before the Court for evidentiary hearing on Wednesday, October 30, 1996, on the Motion of the Debtor, Claudia DeGennaro to Vacate Final Default Judgment. The Court having heard argument and being otherwise duly

advised in the premises, it is hereby

ORDERED AND ADJUDGED

1. For the reasons set forth on the record, the motion of the Debtor, Claudia DeGennaro, to vacate Final Default Judgment is hereby denied.

DONE AND ORDERED in the Southern District of Florida this 12th day of November, 1996.

/s/
ROBERT A. MARK
UNITED STATES
BANKRUPTCY JUDGE